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No. 95-943

In The Supreme Court of the United States

October Term, 1995

AMERICAN ATLAS CORPORATION,

Petitioner,

v.

ALLEGHENY COUNTY INDUSTRIAL DEVELOPMENT AUTHORITY.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a factually warranted and substantively correct summary judgment should be set aside due to the absence of a pre-disposition oral hearing when the non-moving party cannot demonstrate any articulable harm resulting from the omission of a hearing, when it never requested such a hearing in the first instance, and when it had and utilized its ample opportunities to offer written evidentiary and legal arguments against the summary judgment motion?

LIST OF PARTIES

The petitioner—plaintiff and appellant below—is American Atlas Corporation. The respondent—defendant and appellee below—is the Allegheny County Industrial Development Authority. The authority is a public body which serves the greater Pittsburgh area.

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COUNTERSTATEMENT OF THE CASE

The petitioner's procedural statement (Petition for Writ of Certiorari, at 9-17) is generally accurate but incomplete.

Petitioner conveniently ignores the fact that it had ample time to respond to the summary judgment motion, which was filed on January 24, 1995. (S.A. 3).[1] At a February 23 pretrial conference, District Judge Lee ordered that a response be filed by March 10, 1994. (S.A. 6). By agreement of counsel, the response date was extended to March 31, 1994. (S.A. 4, 6-7). On March 31, petitioner filed a brief, an affidavit, and a document described as a response to the summary judgment motion. (S.A. 4). After the Allegheny County Industrial Development Authority filed a reply brief on May 31, 1994, the petitioner obtained leave of court and, then, an extension to file a surreply by July 24, 1994. (S.A. 4). The petitioner's last brief was filed on July 19, 1994. (S.A. 4).

Petitioner never requested an oral argument or any other oral hearing until it filed its appellate brief in the Third Circuit.

COUNTERSTATEMENT OF THE FACTS

During the Spring of 1989, the Allegheny County Industrial Development Authority prepared, advertised and requested bids by circulating to pre-qualified bidders a set of proposed contract documents and addenda (collectively referred to as the proposed contract documents), pursuant to which the successful bidder would undertake the required demolition and environmental remediation and machinery, equipment and other material sales to be performed on certain real property located in the cities of Duquesne and McKeesport, Allegheny County, Pennsylvania. (S.A. 18-20, 35-122). The proposed contract documents (S.A. 35-122) included, *inter alia*, the following as key conditions to the entry into a contract with the successful bidder:

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[1]All references to "S.A." relate to materials contained in the supplemental appendix filed with the Third Circuit.

1. establishment and delivery to the Allegheny County Industrial Development Authority of a letter of credit issued by a federally insured commercial lending institution in favor of the Allegheny County Industrial Development Authority in an amount based on the amount of the successful bid ("Letter of Credit") (S.A. 21, 56-57);

2. delivery to the Allegheny County Industrial Development Authority of a performance bond in the amount of $28,000,000 in the form attached to the bid documents and issued by a company meeting certain financial rating standards ("Performance Bond") (S.A. 21-22, 55, 64, 69, 71-74);

3. delivery to the Allegheny County Industrial Development Authority of a labor and materialmen's bond in the amount of $28,000,000 in the form attached to the bid documents and issued by a company meeting certain financial rating standards ("Payment Bond") (S.A. 22-23, 64, 69, 75-78);

4. securing of comprehensive general liability insurance, workmen's compensation insurance, automobile liability insurance, and hazardous waste/environmental insurance in specified amounts evidenced by certificates of insurance issued by an insurance company or companies meeting certain financial rating standards, authorized to do business in Pennsylvania, "prior to or contemporaneously with the execution, of the proposed contract" ("Certificate of Insurance") (S.A. 23-24,49-50, 68-69); and

5. execution and recording of a no lien contract ("No Lien Contract") (S.A. 24, 51).

On May 12, 1989, the Allegheny County Industrial Development Authority formally opened all bids received, including

that of petitioner. (S.A. 25). Petitioner was the apparent best bidder based solely on cost. (S.A. 25). However, it did not produce a bid bond in the substance or form required by the documents. Furthermore, it did not deliver the required letter of credit, performance bond, labor bond, certificate of insurance, or no-lien agreement required by the bid documents. (S.A. 29-32). Throughout the ensuing several weeks, the Allegheny County Industrial Development Authority conducted a due diligence investigation and continued negotiations with petitioner to determine whether it could, in fact, meet the requirements of the bid documents and thus be the lowest responsible bidder. (S.A. 25). By resolution dated July 7, 1989, it conditionally awarded a contract to petitioner. (S.A. 25-27, 123-27). The July 7 resolution (S.A. 123-27) specifically stated that the award was subject to petitioner meeting certain terms and conditions within 14 days, including: (a) the aforementioned performance bond; (b) the payment bond; (c) letter of credit; (d) no-lien agreement; and (e) certificate of insurance. (S.A. 25-26 123-27).

The July 7 resolution further specifically stated that if the conditions were not met on or before July 24, 1989, no contract would be awarded to petitioner. (S.A. 126). Martin J. Haitz, petitioner's president, testified during his deposition that he understood that the award was conditional. (S.A. 209). He also agreed that the conditions stated in the July 7 resolution were the same as those in the specifications. (S.A. 209). Petitioner failed to meet the conditions in the substance or form required by the proposed contract documents and July 7 resolution and, therefore, did not fulfill the conditions of the July 7 resolution within the compliance period. (S.A. 27-34). The Allegheny County Industrial Development Authority, in an effort to assist petitioner in meeting the terms and conditions, nevertheless adopted a second resolution on July 26, 1989, extending the compliance period until August 10, 1989. (S.A. 28, 141-42). The July 26 resolution

also reiterated the conditions set forth in the proposed contract documents, and provided, once again, that if petitioner failed to comply with the stated conditions, no contract would be awarded. (S.A. 141-42).

At the close of business on August 10, 1989, petitioner still had not produced documents meeting the terms and conditions of the proposed contract documents and foregoing resolutions. (S.A. 24). In fact, at the August 23, 1989, meeting of the Allegheny County Industrial Development Authority Board of Directors, numerous representatives of petitioner admitted its noncompliance with the crucial conditions. (S.A. 29-33).

The proposed contract agreement, included in the proposed contract documents as addendum number 4 (S.A. 90-123), was never executed by the Allegheny County Industrial Development Authority and, in fact, was never presented in execution form by any representative of petitioner.

Petitioner failed and/or refused to produce any evidence to support its position. Specifically, it did not produce: a signed contract; executed or secured performance and payment bonds as required by the proposed contract documents and the resolutions; a certificate of insurance evidencing the types and amounts of coverages specified in the proposed contract documents and the resolutions; a no-lien agreement executed and recorded by petitioner as required in the proposed contract documents and the resolutions; or any other evidence necessary to support its theory that a contract does, in fact, bind the parties. (S.A. 29-32). It utterly failed to comply with the proposed contract documents because it never satisfied the conditions; consequently, no legally binding contract existed between the parties.

The District Court granted summary judgment, concluding that there was no genuine issue of any material fact and that the

Allegheny County Industrial Development Authority was entitled to judgment as a matter of law. (App. B5-B14). Petitioner's admitted failure to provide the bonds called for by the bid documents meant that no contract was ever formed because of petitioner's failure to comply strictly with the bidding requirements. (App. B11-B12, *citing City of Philadelphia v. American Coastal, Inc.*, 704 F. Supp. 587 (E.D. Pa. 1988); and *City of Philadelphia v. Canteen Co., Division of TRW Services, Inc.*, 135 Pa. Commonwealth Ct. 575, 581 A.2d 1009 (1990)). Further, the District Court concluded that petitioner's argument that it substantially complied with the bid requirements lacked any factual or legal basis. (App. B13). The Third Circuit adopted the District Court's analysis of the contract formation issue. (App. A5-A6). It declined to address petitioner's substantial compliance argument, finding it to be at variance with Pennsylvania's requirement of strict compliance in the area of public contracts. (App. A5-A6).

Significantly, the petitioner now asserts no challenge to the lower courts' application of Pennsylvania law to the uncontested facts.

REASONS TO DENY THE PETITION

I. ABSENT ANY MERITORIOUS FACTUAL OR SUBSTANTIVE CHALLENGE TO THE SUMMARY JUDGMENT, ANY FAILURE TO CONDUCT AN ORAL HEARING BEFORE GRANTING SUMMARY JUDGMENT IS, AT MOST, A HARMLESS ERROR.

This Honorable Court should not entertain a petition for certiorari that raises no more than a harmless error. *See* 28 U.S.C. § 2111 ("On hearing of any . . . writ of certiorari . . ., the court shall give judgment after examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."); Fed.R.Civ.P. 61 ("[N]o error or defect in

any ruling or order or in anything done or omitted by the court . . . in ground for . . . vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.''). Applying these criteria, it is clear that the failure to conduct an oral hearing before granting summary judgment is, at most, a harmless error when, as here, the complaining party cannot demonstrate how, if at all, the absence of an oral hearing prejudiced the outcome of the case.

The petitioner has not shown any articulable harm flowing from the lack of an oral hearing in the District Court. Would such a hearing have improved the decision-making function or avoided an erroneous result? This Honorable Court should not be forced to speculate if an alleged procedural error contributed to an improper result below.

The petition is silent as to any factual or substantive legal arguments petitioner could not develop satisfactorily in its affidavits, brief, and reply brief submitted to the District Court. Indeed, the petition assigns no factual or substantive error as a basis for further appellate review. The petition, instead, raises a procedural issue which apparently caused no harm whatsoever. Because petitioner abandoned any further challenge to the factual or substantive basis for the grant of summary judgment, the presence or absence of an oral hearing before entering summary judgment is a moot point. *See, e.g., Fernhoff v. Tahoe Regional Planning Agency*, 803 F.2d 979, 983 (9th Cir. 1986); *Clark Equipment Credit Corp. v. Martin Lumber Co.*, 731 F.2d 579, 581 (8th Cir. 1984).

Any arguable error in failing to hold such a hearing is therefore a harmless error that should be reviewed no further. The petition for certiorari should be denied on that basis alone.

II. PETITIONER WAIVED ANY RIGHT TO CHALLENGE THE DECISION ON THE BASIS THAT IT WAS DEPRIVED OF AN ORAL HEARING BY FAILING TO REQUEST SUCH RELIEF BELOW.

Certiorari should not be granted to consider an issue that was not properly preserved below. *Cf., Beck v. Washington*, 369 U.S. 541, 550-54, 82 S.Ct. 955, 960-62, 8 L.Ed.2d 98, 107-10 (1962); *Godchaux v. Estopinal*, 251 U.S. 179, 181, 40 S.Ct. 116, 117, 64 L.Ed. 213, 214 (1919). Petitioner waived any objection to the procedure employed by the District Court by failing to request an oral hearing on the summary judgment motion. This issue was raised, for the very first time, in the brief submitted to the Third Circuit. (Amended Brief for Appellant American Atlas Corporation, at 17). By then, however, it was too late to complain about the absence of a hearing on the summary judgment motion. *See, e.g., Deutsch v. Burlington Northern Railroad Co.*, 983 F.2d 741, 745 n.2 (7th Cir.), *cert. denied*, ____ U.S. ____, 113 S.Ct. 1845, 123 L.Ed.2d 470 (1993); *Clark Equipment Credit Corp. v. Martin Lumber Co.*, 731 F.2d 579, 581 (8th Cir. 1984) (no reversible error when first request for oral hearing came after summary judgment was granted). *See generally, Aslanidis v. U. S. Lines, Inc.*, 7 F.3d 1067 (2d Cir. 1993) (party opposing summary judgment must raise all arguments below and may not raise new issues for first time on appeal). Accordingly, the petition for certiorari should be denied.

III. PETITIONER WAIVED ANY CONSTITUTIONAL CHALLENGE BECAUSE NO DUE PROCESS OBJECTION WAS EVER ASSERTED BELOW.

In addition to its generalized argument that Fed.R.Civ.P. 56(c) requires an oral hearing on every summary judgment

motion, petitioner asserts that the failure to conduct such a hearing before entry of summary judgment was a denial of due process. (Petition for Writ of Certiorari, at 26). This argument, however, was raised for the first time in the petition and, therefore, is not properly before this Honorable Court.

The absence of a due process challenge below is obvious from a cursory review of the petitioner's brief below. The due process clause of the fifth amendment to the United States Constitution was never even cited below. The *entirety* of the petitioner's argument on this issue below was as follows:

> **C. The Entry of Summary Judgment was Improper In That No Hearing On The Matter Was Conducted**
>
> With the exception of a pre-trial conference, American has never entered a courtroom in this case. However, when there was a motion for summary judgment which could dispose of its entire claim, American was entitled to a hearing on the matter. *Sames v. Gable*, 732 F.2d 49 (3d Cir. 1984); *Season-All Industries, Inc. v. Turkiye Sisi Ve Cam Fabribalari [sic]*, 425 F.2d 34 (3d Cir. 1970).
>
> Based upon the foregoing, it was improper for the district court to have granted summary judgment in favor of ACIDA without having a hearing on the matter. Therefore, it respectfully submitted that a district court's decision should be vacated pending a hearing, to which American is entitled.

(Amended Brief for Appellant American Atlas Corporation, at 17).

Because this due process issue was waived, the petition for certiorari should be denied.

IV. THERE IS NO INTRACIRCUIT CONFLICT OF SUCH MAGNITUDE AS TO WARRANT INTERVENTION THROUGH A GRANT OF CERTIORARI.

Petitioner mistakenly assigns a conflict within the Third Circuit as a basis for granting certiorari. (Petition for Writ of Certiorari, at 17-23). Ordinarily, a conflict between decisions rendered by different panels within the same circuit is not a sufficient basis for granting certiorari. *Davis v. United States,* 417 U.S. 333, 340, 94 S. Ct. 2298, 2302, 41 L.Ed.2d 109, 115 (1974). Any such difference of opinion is an intramural matter best left to the circuit court to resolve through *en banc* procedures. R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice,* § 4.6 (6th ed. 1986). Curiously, petitioner neglected to seek reargument on the basis of any purported conflict within the Third Circuit over the right to an oral hearing on every summary judgment motion. In any event, there is no conflict of such a magnitude within the third Circuit to justify the extraordinary action requested.

The leading case in the Third Circuit on the issue of oral hearings in summary judgment matters is *Anchorage Associates v. Virgin Islands Board of Tax Review,* 922 F.2d 168 (3d Cir. 1990). Petitioner's attempt to distinguish that case (Petition for Writ of Certiorari, at 20-21) is unavailing. In that case, the court recognized unequivocally that Fed.R.Civ.P. 56 does not require an oral hearing in every case before summary judgment can be entered. 922 F.2d at 176. "An opportunity to submit written evidence and argument satisfies the requirements of the rules." *Id.* (footnote omitted). The court went on to note that the appellant in that case had been afforded the opportunity to submit briefs and evidentiary materials and, thus, "would have no cause for complaint if the district court had otherwise complied with Rule 56." *Id.* at 176-77. Here, as in *Anchorage Associates,* the

aggrieved party had ample notice and an opportunity to be heard on the merits of the summary judgment motion. There being no other arguable procedural defect below, this petitioner has no cause to complain. Its opposition to the motion was bereft of any factual or substantive legal support. Its belated and unprecedented attack on the summary judgment procedure should not be countenanced by this Honorable Court.

Contrary to petitioner's suggestion (Petition for Writ of Certiorari, at 21-22), the Third Circuit properly applied *Anchorage Associates* in its subsequent decision in *United States ex rel. Stinson v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991). There, the Third Circuit considered the type of hearing contemplated by the False Claims Act, 31 U.S.C. § 3730. In holding that Congress did not require a live, formal proceeding in that act, the Third Circuit analogized to the hearing of a summary judgment motion under rule 56. 944 F.2d at 1155. The court then accurately recited its prior holding, in *Anchorage Associates*, that the rule does not require an oral hearing before judgment is entered. 944 F.2d at 176. Thus, the citation to *Anchorage Associates* was not *dicta* and, more importantly, it was a correct application of that case.

The other Third Circuit cases cited by the petitioner do not conflict with *Anchorage Associates* and *United States ex rel. Stinson*. Instead, the Third Circuit expressly condoned summary disposition without oral hearings so long as the parties were given ample notice that the motion would be decided on their written submissions. In *Season-All Industries, Inc. v. Turkiye Sise Ve Cam Fabrikalari, A.S.*, 425 F.2d 34, 39 (3d Cir. 1970), the Third Circuit criticized the practice of deciding summary judgment motions without oral argument, but it did *not* set out any absolute rule mandating oral hearings in all cases. The court "believe[d] that it [was] undesirable in general for a district

court to enter summary judgment after receiving briefs and without holding a hearing *unless it makes clear in its order that all affidavits and counter-affidavits must be filed with the briefs.*" *Id.* (footnote omitted; emphasis added). Further, with regard to the effect of Fed.R.Civ.P. 78, which authorizes the District Courts to determine motions on briefs alone, the Third Circuit stated: "we believe resort should not be had to this provision on a motion for summary judgment *unless it is made clear beyond all doubt that the parties must present their affidavits and counter affidavits in addition to whatever facts appear in the pleadings, depositions, answers to interrogatories, and admissions or file.*" 425 F.2d at 39 (emphasis added). In *Season-All,* the summary judgment was vacated because of the deplorable state of the record, which the court characterized as "factually murky" and "obscure," *not* because of the lack of oral hearings. 425 F.2d at 39-40. In *Sames v. Gable,* 732 F.2d 49, 51-52 (3d Cir. 1984), the court factually noted the absence of a hearing, but the true reason the summary judgment was reversed was because important discovery had not been completed. Likewise, the state of the record—and not the absence of a hearing—was the basis for reversal of the summary judgment in *St. Surin v. Virgin Islands Daily News, Inc.,* 21 F.3d 1309, 1313-15 (3d Cir. 1994). In none of these cases did the court overturn the summary judgment simply because there had been no oral argument. To the contrary, as *Anchorage Associates* makes clear, the hearing requirement of Fed.R.Civ.P. 56(c) can be satisfied by giving the non-moving party notice and the opportunity to submit written evidence and argument opposing the motion. 922 F.2d at 176-77.

The motion for summary judgment was filed on or about January 24, 1994. (S.A. 3). At a pretrial conference held on February 23, 1994, the District Court ordered that petitioner should respond by March 10, 1994. (S.A. 6). By agreement of the parties, the District Court extended the response date until March

31, 1994. (S.A. 4, 6-7). That day, petitioner filed a document entitled response to motion for summary judgment, which purported to controvert some of the allegations of the motion; an affidavit of Martin J. Haitz, to which it attached various evidentiary materials supposedly supporting its substantial compliance argument; and a brief in opposition to motion for summary judgment wherein petitioner addressed its theory why summary judgment was inappropriate. (S.A. 4). Thereafter, each party filed reply briefs. (S.A. 4). After obtaining leave of court and an extension, the petitioner's last brief was filed on July 19, 1994. (S.A. 4). At no time did it ever request an oral argument or other form of oral hearing. The summary judgment was not entered until December 16, 1994. (S.A. 5). Surely, the petitioner had notice and exercised its opportunities to present evidence and argument in opposition to the motion.

Because petitioner developed its evidence and arguments below sufficiently in advance of the disposition of the Allegheny County Industrial Development Authority motion for summary judgment, there was no abuse of discretion in deciding the merits of the motion without oral argument. Moreover, this issue, raised for the first time on appeal, is not an adequate reason to disturb a summary judgment that is otherwise proper based on the record and the law. *See, e.g., Clark Equipment,* 731 F.2d at 581. Accordingly, the petition should be denied.

V. THERE IS NO CONFLICT BETWEEN THE CIRCUITS REQUIRING THIS HONORABLE COURT TO INTERVENE.

Petitioner asserts that the decision below conflicts with those of other circuits on the necessity of an oral hearing before deciding a summary judgment motion. (Petition for Writ of Certiorari, at 24-25). This is simply wrong.

Every circuit which has decided this issue—whether a pre-disposition hearing is required under rule 56—has ruled consistently with the Third Circuit that no such hearing is required. *See, e.g., Bratt v. International Business Machines Corp.*, 785 F.2d 352 (1st Cir. 1986); *Sakaria v. Trans World Airlines*, 8 F.3d 164 (4th Cir. 1993), *cert. denied*, ____U.S. ____, 114 S.Ct. 1835, 128 L.Ed.2d 463 (1994); *Allied Chemical Corp. v. Mackay*, 695 F.2d 854 (5th Cir. 1983); *Grigoleit Co. v. United Rubber, Cork, Linoleum & Plastic Workers of America, Local No. 270*, 769 F.2d 434 (7th Cir. 1985); *Clark Equipment Credit Corp. v. Martin Lumber Co., supra* (Eighth Circuit); *Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Development Corp.*, 933 F.2d 724 (9th Cir. 1991), *cert. denied*, 503 U.S. 920, 112 S.Ct. 1295, 117 L.Ed.2d 518 (1992); *Geear v. Boulder Community Hospital*, 844 F.2d 764 (10th Cir.), *cert denied*, 488 U.S. 927, 109 S.Ct. 312, 102 L.Ed.2d 331 (1988); *L.S.T., Inc. v. Crow*, 49 F.3d 679 (11th Cir. 1995); *Spark v. Catholic University of America*, 510 F.2d 1277 (D.C. Cir. 1975).

Petitioner has cited no cases which directly contradict the Third Circuit's ruling.

The only cases cited by the petitioner are readily distinguishable in that they address specific local procedural rules concerning hearings on summary judgment motions. *Dredge v. Penny*, 338 F.2d 456 (9th Cir. 1964); *Dayco v. Goodyear Tire*, 523 F.2d 389 (6th Cir. 1975); and *Yahama Corp. of America v. Stonecipher's Baldwin Pianos & Organs, Inc.*, 975 F.2d 300 (6th Cir. 1992), upheld local rules which required parties to request oral argument on pending summary judgment motions. *Bagby v. United States*, 199 F.2d 233 (8th Cir. 1952), held that a litigant waived her right to an oral hearing by failing to make a request in the lower court. *Jasinski v. Showboat Operating Co.*, 644 F.2d 1277 (9th Cir. 1981), granted an aggrieved party relief because a local rule designed to afford notice and an opportunity to

respond had been breached. Examination of the Third Circuit's decision plainly reveals that this procedural issue was decided without reference to any comparable local rule. (App. A6-A7).

Petitioner now claims, for the very first time, that it was entitled to a hearing under Local Rule 7.1 of the United States District Court for the Western District of Pennsylvania (Petition for Writ of Certiorari, at 19). However, review of the brief below demonstrates that petitioner never objected to the procedure employed as a violation of Local Rule 7.1. The argument devoted to this procedural issue below is set forth at length at page 8 of this brief. Obviously, petitioner is raising Local Rule 7.1 for the first time in its petition. It cannot ambush the Third Circuit by citing this Court to a procedural rule which it waived below.

In short, the petitioner has failed to demonstrate that the Third Circuit decision conflicts with that of any other Circuit. Petitioner's belated attempt to create a conflict by citing a rule it overlooked below is gamesmanship that cannot be rewarded by a grant of certiorari.

CONCLUSION

There is no compelling reason to grant certiorari. Although the petitioner never requested an oral hearing on the summary judgment motion and despite its ample opportunities to present evidence and argument opposing summary judgment, petitioner insists that the absence of an oral hearing requires further review. However, no relief can be granted because any error in the procedural aspect of the case must be viewed as a harmless error absent any legitimate showing that the petitioner was somehow unable to present factual or substantive responses adequately in the District Court. Even if this procedural issue is not harmless or was not waived, the petitioner had opportunities to present its unsupported factual claims and untenable legal arguments to the

District Court and it never asked for an opportunity for oral argument or any other sort of oral hearing. The issues were properly framed and fully addressed on briefs and evidentiary submissions. There was no abuse of discretion in granting the motion without an oral hearing. Moreover, there is no legitimate basis to complain that the decision below conflicts with the decisions of the Third Circuit or any other Circuit. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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